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Citation: 2008 MT 265

2008 MT 265, *; 345 Mont. 147, **;
190 P.3d 318, ***; 2008 Mont. LEXIS 413

SENATE JUDICIARY

EXHIBIT NO. 4

DATE 11/14/09

BILL NO. SB123

STATE OF MONTANA, Plaintiff and Appellee, v. DAVID K. KRUEGER, Defendant and Appellant.

DA 07-0515

SUPREME COURT OF MONTANA

2008 MT 265; 345 Mont. 147; 190 P.3d 318; 2008 Mont. LEXIS 413

June 18, 2008, Submitted on Briefs

August 4, 2008, Decided

August 20, 2008, Released for Publication

PRIOR HISTORY:

APPEAL FROM: District Court of the Twenty-Second Judicial District, In and For the County of Stillwater, Cause No. DC 05-21. Honorable Blair Jones, Presiding Judge.
State v. Krueger, 2007 Mont. Dist. LEXIS 353 (2007)


CASE SUMMARY


PROCEDURAL POSTURE: Defendant appealed the judgment and sentence entered by the Twenty-Second Judicial District Court, Stillwater County, Montana, on his guilty plea to the offense of felony sexual assault.


OVERVIEW: As part of a plea agreement, defendant agreed to plead guilty to felony sexual assault. The district court sentenced defendant and imposed a condition of probation which prohibited him from possessing or consuming alcohol, prohibited his entry into places where alcohol was the chief item for sale, and required testing for alcohol as requested by his probation officer. The Supreme Court of Montana reversed. There was no nexus between the alcohol-related probation restriction and the offense committed in the present case.


OUTCOME: The imposition of the alcohol-related probation condition was reversed, and the case was remanded to the district court for the sole purpose of striking that condition from defendant's sentence.

CORE TERMS: alcohol, nexus, offender, alcohol-related, sentencing, sentence, probation conditions, alcohol abuse, rehabilitation, recidivism, probation, sexual assault, sound judgment, sexual offense, alcohol use, standard of review, legal authorities, pled guilty, sex offenders, contributed, probationers, appreciate, observe, sexual, guilty plea, condition of probation, use of alcohol, psychosexual, evaluator's, felony


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HN1  The Supreme Court of Montana first reviews a sentencing condition for legality. If the probation condition is illegal, the Supreme Court of Montana reverses it. If the condition is legal, the Supreme Court of Montana reviews it for an abuse of discretion, determining whether it constitutes a reasonable restriction considered necessary for the rehabilitation of the defendant or for protecting the victim or society. [More Like This Headnote](#)


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HN2  A probation condition must have a nexus to either the offense or the particular offender. A sentencing court may impose offender-related conditions only where the history or pattern of conduct to be restricted is recent, and significant or chronic. A passing instance of behavior or conduct will not suffice to support a restrictive probation condition imposed in the name of offender rehabilitation. [More Like This Headnote](#)

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HN3  The State must support its arguments with legal authorities. M. R. App. P. 12(1)(f). [More Like This Headnote](#)


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HN4  Montana jurisprudence requires a nexus between an alcohol-related restriction on probation and either the offense or the offender. [More Like This Headnote](#)


COUNSEL: For Appellant: Vernon E. Woodward ; Hendrickson, Everson, Noenning & Woodward, Billings, Montana.

For Appellee: Hon. Mike McGrath, Montana Attorney General; Mark W. Mattioli, Assistant Attorney General, Helena, Montana; John I. Petak, III; Stillwater County Attorney, Columbus, Montana; A. W. Kendall; Attorney at Law, Red Lodge, Montana.

JUDGES: KARLA M. GRAY . We concur: PATRICIA COTTER , W. WILLIAM LEAPHART , JIM RICE , JOHN WARNER . Chief Justice Karla M. Gray  delivered the Opinion of the Court.

OPINION BY: Karla M. Gray 

OPINION

*****319** ****147** Chief Justice Karla M. Gray  delivered the Opinion of the Court.

P1** David K. Krueger appeals from the judgment and sentence entered by the Twenty-Second Judicial District Court, Stillwater *148** County, on his guilty plea to the offense of felony sexual assault. The sole issue he raises on appeal is whether the District Court erred in imposing condition of probation 12, which prohibits him from possessing or consuming alcohol, prohibits his entry into places where alcohol is the chief item for sale and requires testing for alcohol as requested by his probation officer. We reverse.

BACKGROUND

[*P2] As part of a plea agreement with the State of Montana, Krueger agreed to plead guilty to the offense of felony sexual assault. In exchange, the State agreed to dismiss charges of indecent exposure, and to recommend a 10-year sentence to the Montana State Prison with all time suspended. The District Court accepted the guilty plea and ordered a presentence investigation (PSI).

[*P3] The District Court subsequently scheduled a sentencing hearing and Krueger filed objections to some of the 44 conditions of probation recommended in the PSI. The court and counsel discussed Krueger's objections during the hearing, including his "lack of nexus" objection to the proposed alcohol-related condition number 12.

[*P4] The District Court sentenced Krueger, including condition number 12, and entered judgment. It also filed a Memorandum in Support of Sentence Imposed. Krueger appeals from the imposition of condition 12.

STANDARD OF REVIEW

[*P5] In *State v. Ashby*, 2008 MT 83, 342 Mont. 187, 179 P.3d 1164, we set forth a new standard of review of challenged probation conditions. ^{HN1} "We will first review a sentencing condition for legality." *Ashby*, P 9. If the challenged condition is illegal, we will reverse it. If the condition is legal, we will review it for an abuse of discretion, determining whether it constitutes a reasonable restriction considered necessary for the rehabilitation of the defendant or for protecting the victim or society. See *Ashby*, P 9; *State v. Herd*, 2004 MT 85, PP 18-23, 320 Mont. 490, PP 18-23, 87 P.3d 1017, PP 18-23.

DISCUSSION

[*P6] Did the District Court err in imposing the alcohol-related probation condition 12?

[*P7] In the present case, nothing of record ties alcohol use to the sexual assault offense. In addition, Krueger's history and experience with alcohol is mentioned in only one portion of the PSI. He reported tasting **[**149]** alcohol at age 6, when offered it by a friend's brother. Krueger's current use of alcohol was reported to be "3 bottles in 2 weeks." The PSI preparer observed that Krueger reported to the psychosexual evaluator that **[***320]** he is "not much of a drinker, never a problem[.]"

[*P8] In *Ashby*, we expanded our earlier jurisprudential rule which required probation conditions to have a nexus to the offense. We determined that ^{HN2} "a condition must have a nexus to either the offense or the particular offender." *Ashby*, PP 14-15 (citations omitted). We cautioned, however, that a sentencing court may impose offender-related conditions only where the "history or pattern of conduct to be restricted is recent, and significant or chronic." A passing instance of behavior or conduct will not suffice "to support a restrictive probation condition imposed in the name of offender rehabilitation." *Ashby*, P 15.

[*P9] In *Ashby*, the defendant did not use alcohol during commission of the offense and his PSI revealed no history of alcohol abuse. Nor did the sentence state any facts supporting an alcohol restriction. *Ashby*, P 16. Rejecting numerous arguments from the State regarding why the alcohol prohibition should be retained as part of the sentence, we discerned no offense or offender nexus supporting an alcohol prohibition and, consequently, concluded the sentencing court could not "rehabilitate" a non-existing problem. We reversed the alcohol-related condition. *Ashby*, P 19.

[*P10] Here, the record supports the same result. As set forth above, the record before us

is devoid of any indication that alcohol was related to the sexual assault offense or that the offense occurred at a time when Krueger had been drinking. Nor does the record indicate any history of alcohol abuse by Krueger.

[*P11] We turn, then, to the District Court's memorandum in support of its imposition of condition 12 and the State's arguments on appeal, observing that neither the sentencing court nor the State had the benefit of our decision in *Ashby* at the time of the events at issue here. The District Court's memorandum concedes that the State presented no evidence that alcohol contributed to the sexual offense to which Krueger pled guilty. Under *Ashby*, this concession constitutes a determination that no "offense nexus" existed. The memorandum does not even suggest that Krueger has a history of alcohol abuse and, indeed, the record does not reflect such a history. As in *Ashby*, we discern no "offender nexus."

[*P12] The District Court's rationale is based on the fact that this case involved a sexual offense against a minor child. The court explained that it imposed the alcohol-related restriction because it recognized 1) **[**150]** the "moral bankruptcy" of Krueger's actions; 2) the "absolute lack of any semblance of sound judgment" in committing the offense; and 3) the psychosexual evaluator's assessment that Krueger's insight is poor and his judgment only fair. It went on to discuss the disinhibiting nature of alcohol and the necessity of discouraging recidivism by sexual offenders. At the bottom line, the District Court determined that, "[i]n sentencing sexual offenders, imposing a restriction which seeks to preserve sound judgment and appropriate boundaries facilitates rehabilitation, reduces recidivism, and protects the victim and society."

[*P13] We appreciate the District Court's sensitivities to the nature of the offense in this case, and we understand its outrage. We conclude, however, that the District Court has failed to establish a nexus between any of Krueger's personality traits and a use of alcohol by him. Certainly, many criminal offenders may be morally deficient, lacking in insight and sound judgment. Indeed, many non-offenders no doubt share the same deficiencies. Here, Krueger had no history of alcohol abuse and alcohol was neither part of nor contributed to the offense to which he pled guilty. Krueger had no prior criminal record except for a reckless driving offense a number of years earlier. "Fixing" a non-existent problem does not contribute to an offender's rehabilitation. It also does not protect either the victim or society.

[*P14] Finally, we address the State's arguments in support of the alcohol-related probation condition. First, the State contends "[i]t does not require citations to legal authorities or peer-reviewed articles for sentencing courts to appreciate that a person who has the potentiality for sexually offending against girls as young as 10 years of age **[***321]** should not be permitted to use alcohol[.]" While many Montanans might well agree that such a person should not be permitted to use alcohol--or, indeed, that no person should be permitted to use alcohol--^{HN3}the State is well aware that it must support its arguments with legal authorities. See M. R. App. P. 12(1)(f).

[*P15] The State does advance a number of United States Supreme Court decisions which observe that the recidivism rate of probationers is higher than the general crime rate; probationers are more likely than ordinary citizens to violate the law; sex offenders are a serious threat to this country; and the recidivism rate posed by sex offenders is high and frightening. These observations are likely true. They do not, however, create a nexus between an alcohol-related probation restriction and the offense committed in the present case; they also do not create a nexus between Krueger and an alcohol use problem. *Ashby* **[**151]** requires that one such nexus be established. *Ashby*, P 19.

[*P16] Finally, the State advances *State v. Wardle*, 137 Idaho 808, 53 P.3d 1227, 1230 (Idaho App. 2002), in which the intermediate Idaho appellate court determined that "[a]bstinence from alcohol consumption is reasonably calculated to aid in preventing a recurrence of this criminal behavior [involving poor judgment regarding a child]." We observe that the

Idaho court also observed that the record there presented no reason to believe that alcohol was a factor in the offense. *Wardle*, 53 P.3d at 1230. Unlike the apparent situation in Idaho, ^{HN4} our jurisprudence requires a nexus between an alcohol-related restriction and either the offense or the offender. Consequently, *Wardle* is not persuasive.

[*P17] We hold that the District Court erred in imposing the alcohol-related probation condition and remand for the sole purpose of striking that condition from Krueger's sentence.

[*P18] Reversed.

/s/ KARLA M. GRAY

We concur:

/s/ PATRICIA COTTER

/s/ W. WILLIAM LEAPHART

/s/ JIM RICE

/s/ JOHN WARNER

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